



Preparatory Commission for the International Criminal Court

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Summary of statements made in plenary in connection with the adoption of the report of the Working Group on the Rules of Procedure and Evidence and the report of the Working Group on Elements of Crime

Angola*

[Original: Spanish]

Rule 9.19¹, sub-rule 2, may not be interpreted in a manner incompatible with the provisions of article 98, paragraph 2, of the Statute.

Côte d'Ivoire**

[Original: French]

The delegation of Côte d'Ivoire wishes to clarify its position on two points: the heading to article 7, on the one hand, and, above all, the proposed amendment to article 98, paragraph 2, on the other.

With regard to the heading to article 7, Crimes against humanity, the delegation continues to have difficulties with the proposal which supposedly achieved a consensus, in particular with respect to the last paragraph.

On the subject of article 98, paragraph 2, in addition to the linguistic difficulties relating to the translation from English to French, which were very aptly raised by the French delegation, my delegation remains unsatisfied as it considers that the proposal contained in document PCNICC/2000/WGRPE(9)/RT.2,² if it were eventually to be adopted, by vote or by consensus, would be nothing less than an amendment to the Rome Statute.

There are many reasons for that understanding of the situation, the chief among them being the following:

First, a comparative, semantic and substantive study of the two texts indicates clearly that, under the Rome Statute, not all requests for the surrender of a suspected person require the consent and prior agreement of the State of which the accused person is a citizen. It is a matter of special cases in which the warrant of surrender would oblige the requested State to violate one or more of the conventions that require the prior consent of the said State before its citizen is surrendered to the International Criminal Court. In these special cases, the Court may always have recourse to judicial assistance to request the surrender of the accused person. The Rome Statute refers only to a "request".

* A single asterisk following the name of the country indicates a statement made after the adoption of the report of the Working Group on the Rules of Procedure and Evidence and the report of the Working Group on Elements of Crimes.

** A double asterisk following the name of the country indicates a statement made before the adoption of the report of the Working Group on the Rules of Procedure and Evidence.



Contrary to the Rome Statute, the proposal contained in document PCNICC/2000/WGRPE(9)/RT.2 indicates that it is not special cases but **all cases** involving the surrender of accused persons that are subject to the prior consent of the requested State. In the opinion of the delegation of Côte d'Ivoire, this is not what is envisaged in the Rome Statute.

Moreover, under the new proposal, it is no longer possible for the Court to have recourse to judicial cooperation.

The text entitled "Proposed understanding in connection with rule 9.19, for incorporation into the proceedings of the Preparatory Commission" (PCNICC/2000/WGRPE(9)/RT.3) does not resolve the concerns of Côte d'Ivoire.

Second, the wording of article 98 of the Rome Statute itself raises difficulties. Although Côte d'Ivoire accepted it in Rome, that was purely out of a spirit of consensus. It was by the Rome text that Côte d'Ivoire consented to be bound. If the Preparatory Commission accepts the *de facto* amendment to article 98, paragraph 2, which goes to the heart of the Rome Statute, Côte d'Ivoire considers that to be a serious precedent which, we hope, will also entitle us to propose other amendments in the future. Côte d'Ivoire is ready for such an exercise if that is what the States wish.

As far as we have understood it, the International Criminal Court was established in order to punish States through physical persons who, being legally bound to those States, commit crimes against humanity, without the responsibility of the States concerned thereby being lifted in any respect. It is not desirable that such criminals should be afforded an umbrella of impunity because of grammar and semantics.

The Rome Statute provides its own amendment procedure, both the letter and the spirit of which should be respected. Although we signed the Statute, we continue to receive corrections to it relating to its translation into French in particular, and these corrections in many respects affect the substance of the text and could therefore be regarded as undeclared amendments. However, if a formal amendment were to be proposed at the present meeting, the delegation of Côte d'Ivoire would request that it be put to the vote.

The delegation of Côte d'Ivoire feels itself bound only by the Rome Statute as signed by the plenipotentiary of its country.

Cuba*

[Original: Spanish]

We are here, participating actively and constructively in the negotiations of the Preparatory Commission because we believe in the United Nations and because we consider that the International Criminal Court has the capacity to be independent, impartial and complementary to national systems of justice.

We are simply halfway along a long road in which the major compromise with the International Criminal Court, with the international community and with the non-governmental organizations that have contributed to that process is made by the country that was the intellectual author of the "compromise" proposals that we are adopting, the same country that promised to "cooperate" with the International Criminal Court although, of course, to the extent allowed by its "national security interests", the same country that will perhaps never become a State party to the Statute but which persists in its purpose of dominating and manipulating the Court and its procedures from outside.

For the purposes of the records and the institutional memory of the Preparatory Commission, the delegation of Cuba wishes to make the following statements with respect to the introduction to article 7 on Crimes against humanity and on rule 9.19 (2).

We consider that the link established in the introduction on Crimes against humanity between article 7 of the Statute and international criminal law is a legal fiction which is due to demonstrate its real usefulness with the entry into force of the Statute and through the impartial activities of the future judges of the Court.

As the President said during the Conference of Plenipotentiaries in Rome, when a number of delegations proposed the inclusion of crimes such as mercenarism, illicit trafficking of drugs, other crimes of sexual violence or the trafficking of organs in the Statute of the International Criminal Court, "crimes of crimes" were included such as crimes against humanity which are a matter of concern and condemnation for the international community as a whole.

Cuba is confident that the impartiality of the judges of the International Criminal Court will be established, that the integrity of the Statute will prevail and that the introduction to article 7 will not constitute

an obstacle to the progressive development and subsequent codification of international criminal law, an as yet undefined and emerging branch of international law.

With respect to rule 9.19 (2), it is clear that its incorporation in the Rules of Procedure and Evidence of the International Criminal Court is a reflection of the concern of the intellectual author of that rule at the possibility that future decisions by the Court might affect the conduct and hegemonistic priorities of the country in foreign policy and in matters of international peace and security.

Cuba vigorously rejects any attempt to alter or restrict the competence of the Court or to impair the integrity of the Rome Statute.

Cuba considers that article 98 of the Statute refers to agreements between countries such as extradition agreements or treaties on the status of forces and not to agreements between international or regional organizations, or between military or strategic alliances.

Furthermore, article 2 refers to relationship agreements which are generally conducive to cooperation between international organizations.

Such agreements have not been and could not be used to compromise third parties, particularly States, because international organizations are ultimately subordinate to States.

It has been a privilege for the delegation of Cuba to work under the guidance of the Chairman of this Preparatory Commission.

The road ahead of us is a long one. We still have to negotiate important instruments and various issues including the agreement on the relationship of the Court with the United Nations, the Financial Regulations of the Court and the definition of the crime of aggression.

We shall ensure that in those instruments and definitions the integrity of the Rome Statute is preserved and that the competence of the Court is not restricted.

Cuba will continue to make a constructive contribution to that process of negotiation in the conviction that the legitimate interests of the international community and of the majority of States members of the United Nations will gain the upper

hand, and that the will of those countries that truly support the International Criminal Court and wish to see it become an agency of international justice which is just, independent and complementary to national systems of justice will prevail, rather than aspiring to control the Court or make it the hostage of strategic interests and world hegemonism.

Egypt*

[Original: English]

The delegation of Egypt has, throughout the negotiation process, highlighted the importance of qualifying the term "fundamental rights" which appears in several places in the document on "Elements of Crimes", so as to ensure that no State shall be held accountable for the non-observance of values or norms that arise only in one region or civilization. Egypt's understanding, which is quite in conformity with the rules of international law, is that such fundamental rights should be those which are recognized and accepted on the universal level, that is to say, those rules applicable vis-à-vis the State, either because they constitute international custom as a source of international law or because the State has accepted them through its conventional obligations.

Mexico*

[Original: Spanish]

The delegation of Mexico wishes, for the record, to state the interpretation it gives to the term "international penal law" which appears in paragraph 1 of the introduction to article 7, Crimes against humanity, contained in document PCNICC/2000/WGEC/L.1/Add.1.

That term refers to a branch of international law which is in the process of development through the adoption of the Rome Statute of the International Criminal Court. Even though a true "international criminal law" cannot be regarded as being in existence, Mexico hopes that the entry into force of the Statute will contribute to the development and consolidation of that discipline, whose principal objective is to create substantive and procedural standards for the prosecution and punishment of the perpetrators of the most serious crimes of concern to the international community as a whole, on the basis of the principle of complementarity with national judicial systems.

New Zealand*

[Original: English]

The delegation of New Zealand considers it very important that it has been possible to adopt the Rules of Procedure and Evidence and the Elements of Crime by consensus. For the Court to be effective and credible it needs the widest possible ratification and support from the whole of the international community. The consensus adoption of the two texts is a demonstration that all countries remain engaged and committed.

New Zealand is pleased that it was possible to reach agreement on Rule 9.19,¹ as clarified by the understanding incorporated in the proceedings. In all its work, this Preparatory Commission has been guided by the overriding principles of maintaining the integrity of the Statute in all respects. New Zealand is pleased to see the statement in the explanatory note which introduces the Rules that the Rules are an instrument for the application of the Statute and in all cases are subordinate to it. New Zealand records its firm view that rule 9.19 is consistent with Article 98, paragraph 2, and in no way undermines the Statute. The reference to article 98, paragraph 2, in the rule makes clear that it is the article itself that is the determining element. New Zealand hopes that the fact that these two key aspects of the Preparatory Commission's mandate have been successfully completed will send an encouraging signal to all countries and will encourage intensified efforts towards ratification.

Nigeria*

[Original: English]

Nigeria believes that the adoption of the two technical instruments, the Elements of Crimes and the Rules of Procedure and Evidence, will enable the International Criminal Court to take off smoothly. Unlike the International Tribunal for the Former Yugoslavia which had no pre-formulated Rules of Procedure and Evidence and therefore had to make its Rules of Procedure (on the directives of the Security Council), the International Criminal Court, when it takes off, will have recourse to an existing Rules of Procedure and Elements of Crimes. The International Criminal Court therefore would not grapple with the problems of lack of Rules of Procedure and Evidence

as experienced by the International Tribunal for the Former Yugoslavia. In this regard, the International Criminal Court, by the time it takes off, could be likened to a child born with a silver spoon in its mouth, given that all the important documents for the effective functioning of the Court would have been in place.

Nigeria attaches great importance to the International Criminal Court. Nigeria signed the Statute on 1 June 2000 and all the processes leading to ratification are being examined. It is hoped that ratification would take place in the near future.

Nigeria believes that no document of this nature (the Rules of Procedure and Evidence or Elements of Crimes) is perfect. There may be some ambiguities or drawbacks in the adopted Rules of Procedure and Evidence, and the Elements of Crimes. It is the view of the delegation of Nigeria that such ambiguities would have to be resolved by the judges through the rules of interpretation. In spite of the existence of such ambiguities, Nigeria believes that the Statute's integrity remains intact.

In connection with rule 9.19¹ concerning the Rules of Procedure and Evidence relating to Part 9 of the Statute, there is the speculation, or impression or even insinuation, among some Member States that the adoption of rule 9.19 in relation to article 98, paragraph 2, of the Statute would open the door to sinister interpretations or manoeuvring. In Nigeria's view, it is premature to think or believe that the adoption of rule 9.19 in relation to article 98, paragraph 2, of the Statute will lead to such a scenario. We believe that the adoption of rule 9.19 reflected or demonstrated the spirit of give and take among delegates throughout the course of the present exercise. However, if it is the intention or strategy of any State or group of States to exploit the adoption of this rule for any sinister objectives (which may affect the integrity of the Statute), such an intention or manoeuvring will be equivalent to embarking on an uncharted voyage hoping to pick up the compass somewhere along the line: the compass may not be picked.

Portugal (on behalf of the European Union)*

[Original: English]

The European Union is pleased that an agreement was reached. The formula that was adopted, which

includes as an essential element the understanding in connection with rule 9.19¹ to be incorporated into the proceedings of this Preparatory Commission, represents the compromise possible. As the Union stressed in its previous statement on the matter, any decision taken should respect the integrity of the Rome Statute. Consequently, the European Union will never accept any interpretation of this rule that is not in full conformity with the Statute. And in all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Rome Statute.

Singapore*

[Original: English]

The two instruments adopted by the Preparatory Commission have taken different approaches to the use of footnotes. While the Elements of Crimes document contains clarificatory footnotes in various places, the Working Group on the Rules of Procedure and Evidence has not included footnotes in its final text. Rule 4.30³ of the Rules of Procedure and Evidence (on the disqualification of judges, the Prosecutor and Deputy Prosecutor) (see PCNICC/2000/WGRPE/L.2) has remained unchanged from its Mont Tremblant version. In the Mont Tremblant text (PCNICC/2000/WGRPE/INF/1), footnote 10 records a general understanding by the drafters of the Rules that in certain circumstances, nationality can be taken into account as a ground on which a person's impartiality might reasonably be doubted. Singapore is nevertheless satisfied with the texts as they are currently presented and supports their adoption by the Preparatory Commission.

Turkey*

[Original: English]

Turkey would like to place on the record its position on the following issues on the Elements of Crimes contained in document PCNICC/2000/WGEC/L.1/Add.1. Concerning footnote 7 on the term "forcibly" pertaining to the crime against humanity of deportation or forcible transfer of population in article 7 (1) (d), Turkey observes that that footnote goes beyond the actual scope of this term in the Statute. The term "forcibly" is explicit by itself and does not need further explanation. The way this particular term is

explained in the footnote is rather ambiguous and likely to cause misinterpretation. In particular, the phrase "such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment" does not have any legal basis in the Rome Statute. Furthermore, it might evoke an abusive interpretation of the term beyond its common meaning. In the view of Turkey, a greater degree of clarity and precision is needed to avoid including transfers of population that would be legally acceptable, for example, for reasons relating to the protection of the population, health conditions or economic development. This last point was already made within the work of the International Law Commission and contained in the report of the International Law Commission on the work of its forty-seventh session.⁴ Therefore, Turkey reserves its position regarding this footnote, without prejudice to the consensus itself.

United Arab Emirates*

[Original: Arabic]

The delegation of the United Arab Emirates wishes to put on record its dissatisfaction at the inclusion of footnote 7 to article 7 (1) (d) in document PCNICC/2000/WGEC/L.1/Add.1 on the grounds that the substance of that footnote extends the concept of "force" in a manner contrary to the provisions of the Statute.

The delegation also wishes the understanding we reached concerning Elements of Crimes and Rules of Procedure and Evidence to be respected when it is adopted by the States Parties.

Notes

¹ Former rule 9.19 was renumbered as rule 195 in the finalized draft text of the Rules of Procedure and Evidence (PCNICC/2000/INF/3/Add.1).

² Also contained in document PCNICC/2000/WGRPE/L.14/Add.2.

³ Former rule 4.30 has been renumbered as rule 34 in the finalized draft text of the Rules of Procedure and Evidence (PCNICC/2000/INF/3/Add.1).

⁴ See *Official Records of the General Assembly, Fiftieth Session, Supplement 10 (A/50/10)*.